No. 14,805

United States Court of Appeals
For the Ninth Circuit

American Pacific Dairy Products, Inc., a Corporation, *Appellant,* vs. Joseph A. Siciliano, *Appellee.*	
Joseph A. Siciliano, *Appellant,* vs. American Pacific Dairy Products, Inc., a Corporation, *Appellee.*	

BRIEF OF CROSS-APPELLANT JOSEPH A. SICILIANO IN RESPONSE TO REPLY BRIEF OF AMERICAN PACIFIC DAIRY PRODUCTS, INC., CROSS-APPELLEE.

John A. Bohn,
P. O. Box 771, Agana, Guam,
Walter S. Ferenz,
903 First Street, Benicia, California,
Attorneys for Cross-Appellant and Appellee.

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FURTHER COMMENTS ON STATEMENT OF FACTS.

This constitutes the third statement of this case by the plaintiff, Mr. Joseph A. Siciliano (hereinafter referred to as Appellee) and is an additional attempt to present a clear picture of the facts, and, particularly,

to place them in the perspective that is demanded by the nature of the original transaction in Guam.

As such, the Appellee refers to his Statement of the Facts and his Comment to Appellant's Statement of the Case contained in his opening brief and response brief, respectively.

Before discussing individually the points raised by Appellant in its response brief, Appellee desires to restate, at the risk of belaboring the point, the nature of the transaction.

The giving of testimony in the trial in Guam commenced by Plaintiff taking the stand. His initial testimony established that, as a business man on Guam, he owned and operated a large luxury type restaurant and night club, a bakery, a snack bar, a farm and part interest in a sea-going vessel. These business enterprises were owned and operated primarily by and through a corporation, Pacific Enterprises, Inc., of which Appellee owned all but a few qualifying shares.

At the time Mr. Edward Thompson, president of Appellant corporation, negotiated with Appellee, the Record shows that Appellee employed between 100 to 110 employees, and that his combined operations grossed from $1,500.00 to $2,000.00 per day (Record, pages 137-138).

On page 97 of the Record, the trial court in its Memorandum Opinion, stated in part as follows:

> "* * * Because of his energy and business acumen he (appellee) was recognized as a very successful businessman. * * *"

Mr. Edward Thompson himself testified that Appellee was "one of the ablest men I know." (Record, page 252).

The trial court apparently concluded from the facts and some language in the agreement (see Memorandum Opinion, Record, page 98) that the agreement required the Appellee to act as manager of the Dairy Queen in the same capacity and same manner that Joseph Meggo, employee of Pacific Enterprises, Inc., did act, and that Norman Thompson now acts.

However, Appellee contends that the facts recited hereinabove must necessarily detract from the finding of the trial court and the contention of Appellant. Certainly, from an examination of Appellee's position in Guam and his business activities and ability, Appellee contends that the evidence does not sustain a finding that the parties intended and agreed that Appellee was to act as manager in the sense that the daily reports, inventories, mixing and dispensing of ice cream, ordering of supplies and all other routine matters must personally be attended to by Appellee. The business of this partnership or venture was the mixing and dispensing of ice cream under the simplest of methods. Can it really be said that Appellee, Mr. Joseph Siciliano, was required to personally oversee the venture and was thereby prevented from delegating the managership to others?

On page 2 of Appellant's response brief, in an effort to attack the contention of Appellee that the managership duties were delegated to employees of

Pacific Enterprises, Inc., Appellant has referred to the fact that the salaries of such employees were not allowed as a charge against the partnership in the companion case of *Pacific Enterprises, Inc. v. American Pacific Dairy Products, Inc.* Appellee absolutely concurs in this finding because it completely substantiates the proposition that performance assumed by Appellee was delegated. If, in fact, Joseph Meggo and Enesto O. Diza were employees of Edward Thompson, or Appellant, then the partnership should have paid their salaries and not Pacific Enterprises, Inc., as was the case. As Appellee pointed out in his response brief, the partnership was not held responsible for such salaries, not because there was no evidence to support them, but because of their nature. This point was recognized by the trial court when it said:

> "* * * The Court. They (salaries) were not charged on your (Pacific Enterprises, Inc.) books. Consequently I just have to assume that they were a gratuitous contribution by Mr. Siciliano during this hiatus period when he wasn't sure whether he was coming back or not." (Record, Case No. 14806, page 231)

Appellant, in its response brief (page 2), has cited the Record of Case No. 14806, pages 70-71 for the proposition that there is no evidence to support the salaries claimed by Pacific Enterprise. The fact salaries were paid is not disputed even by Appellant's president. The more accurate statement, from the

Record cited by Appellant above, is that salaries were paid but not by the partnership.

Appellant has placed great stress on the amount of communication between Appellee and his employees during the former's two year absence (Appellant's response brief, page 3). Also, much emphasis is placed on the several findings of the trial court relating to the general conditions at the Dairy Queen store when Appellant assumed managerial control. Appellee has already admitted that any partner has the right to manage as a right of the law of partnerships, and that Appellee has also admitted for the purpose of discussion only, that Appellant might be justified in excluding Appellee's employees from the business. However, Appellee wishes to point out that these facts are not pertinent in a determination of whether a valid delegation of duty was made and has, in reality, no bearing on dissolution of the partnership.

Appellant contends that the reports prepared by Enesto O. Diza, Appellee's bookkeeper, were not accepted by Mr. Edward Thompson (Appellant's response brief, page 3). However, in the Supplemental Findings of Fact, the lower court specifically found that the Appellant did accept the accuracy thereof. Its finding reads in part as follows:

> "* * * 2. The bookkeeper for Pacific Enterprises, Inc., prepared monthly financial statements, cumulative in nature, in accordance with defendant's instructions, and the defendant accepted such statements as being correct. * * *" (Record, page 110)

This finding is supported by the testimony (Record, Case No. 14805, pages 334-349). Appellee has not contended that Mr. Edward Thompson testified to the accuracy of Mr. Diza's monthly reports. Appellee only contends that the same were accepted by Appellant as accurate.

Appellee believes, and the trial court did also, that the testimony indicated that for the period from June 22, 1952 through May 31, 1953, cumulative monthly financial statements were prepared and, those prior to May at least, were mailed to Mr. Edward Thompson in Seattle. These reports were received periodically and the record fails to state that the same were inaccurate or even that Mr. Thompson felt they were inaccurate.

Also, Appellant admits receiving checks and drafts from Appellee totaling over $100,000.00. Taken together, the reports show that the net profit from June 22, 1952 to May 31, 1953 was $31,403.47 (Record, Case No. 14805, page 214). Of course, this figure is derived from the bookkeeping record of Mr. Diza, but Appellant offered no evidence to contradict the financial statement which supplied the profit figure and there is nothing in the record to indicate the figure is not accurate.

Appellant has also questioned the accuracy of Appellee's Statement of the Case in regard to the Appellant's wrongful use of partnership funds in a competing business. That portion of Appellant's response brief which is concerned with this matter is set forth in full as follows:

"* * * Cross-appellant Siciliano states that profits and funds of the partnership business were used by the defendant for the benefit of a competing corporation known as Guam Frozen Products, Inc. (Pl. Br., page 7-8). It is true that funds of American Pacific Dairy Products, Inc., were used in establishing Guam Frozen Products, Inc., but this was done after the dissolution and termination of the purported partnership and *the Record does not reflect that any of the funds of Siciliano were used for this purpose (R. 14805, page 239-242).* * * *" (Emphasis supplied)

In answer to the above statement, Appellee sets forth the following portions of the Record in Case No. 14805 containing testimony of Appellant's president, Mr. Edward Thompson:

"* * * Q. What line of business is American Pacific Dairy in?

A. No other line of business. If there was miscellaneous receipts they would go in there but I don't know of any miscellaneous receipts.

Q. So your testimony is that all the money in the account of American Pacific Dairy Products established in the Bank of America, Agana, Guam, came from Dairy Queen, is that correct?

A. I would say so, yes.

Q. Well, is that wrong?

A. No; it is right.

Q. Now, from that account there was spent $26,740.63 for the benefit of a corporation known as Guam Frozen Products, Inc.?

A. That is right, sir, yes. * * *" (Record, Case No. 14805, page 239)

Mr. Edward Thompson's testimony continues as follows:

> "* * * The Court. Have either Mrs. Litch or Mr. Hevessy participated in the management of the second store?
>
> A. No, sir.
>
> The Court. Then why do you contend that Mr. Siciliano isn't entitled to participation on the same basis in the second store? You have denied Mr. Siciliano the right to participate in the profits?
>
> A. That is right; yes, sir.
>
> The Court. You just said you have Mrs. Litch and Mr. Hevessy in the second store?
>
> A. We organized the corporation and they bought stock in it.
>
> The Court. You have the use of their money?
>
> A. Yes.
>
> The Court. *And you had the use of Mr. Siciliano's money?*
>
> A. *Yes.* * * *" (Record, Case No. 14805, page 245) (Emphasis supplied)

Appellant on appeal now feels that it did not use Appellee's money for this diversionary project. However, his conclusion is an erroneous conclusion of law and additionally is contradicted by the testimony of its own president.

ARGUMENT.

I.

THE LOWER COURT ERRED IN HOLDING AND DECIDING APPELLEE, MR. JOSEPH A. SICILIANO, BREACHED THE PARTNERSHIP AGREEMENT.

As stated in his opening brief (pages 11-19), reference to which is hereby made, Appellee believes and contends, on the basis of the facts as produced at the trial, that, as a matter of law, he did not breach the partnership agreement. For the purposes of this brief, Appellee will restate his position for the purpose of attempting to clarify the issue.

The lower court erred in interpreting the partnership agreement as binding the appellee to assume the responsibilities of manager.

Although Appellee recognizes the Federal Rules of Procedure apply in this case, the action itself is not a federal case except for the fact that it arises in an unincorporated territory of the United States. Consequently, because of uncertainty, Appellee has used California authority on matters involving scope of review on appeal even though the proper authority might be federal cases. However, Appellee believes that the rules of law used are of sufficiently general nature to be persuasive, even though perhaps not binding, authority on this Court.

Appellee contends that the lower court construed the contract as placing a contractual duty on Appellee to manage the Dairy Queen, and to arrive at this conclusion apparently resorted to extrinsic evidence (Record, pages 98-99). Appellee believes that because

the facts relating to the execution of the contract such as, what the Appellant sought, what the Appellee wanted, and, particularly, what the Appellee had to offer in the way of organization, capital, and local connections, are not in substantial dispute, the construction of this contract is a matter of law and hence subject to review by this Court (*Leis v. City and County of San Francisco* (1931) 213 Cal. 256, 2 P. (2d) 26).

Appellee contends the language of the written instrument was clear and unequivocal that Appellee would be paid if he assumed managerial responsibility, and that, therefore, this Court should re-examine the agreement and review the decision of the lower court (*Brant v. California Dairies* (1935) 4 Cal. (2d) 128, 48 P. (2d) 13).

The fact that Appellee left Guam on July 1, 1952 and did not return for two years is an undisputed fact. Therefore, Appellee contends, assuming it is found that Appellee was obligated to assume the responsibilities of managership, that this Court should review whether or not by his prolonged absence he breached this duty where,

(1) the contractual duty of being manager (assuming it exists), does not require that Appellee be physically present on Guam at all times; and

(2) the contract does not prevent delegation of duties thereunder; and

(3) Appellant accepted the delegated performance with knowledge thereof until April, 1953; and

(4) there is no evidence in the record to dispute the above facts.

In its Memorandum Opinion (Record, page 100), the court found as follows:

> "* * * The Defendant (Appellant here) took full advantage of the services being performed by Pacific Enterprises, Inc., and accepted the benefits of a successful operation; it has not accounted for any profits during such period. * * *"

Appellant, on page 10 of its opening brief, has objected to the theory of this case as contended by Appellee on the grounds that the performance delegated varied materially from that which might be the case had Appellee not left Guam and that there was no assent to the delegation. However, there is no evidence in the record that the expected performance of Appellee would have been different from that which was actually received or expected (Memorandum Opinion, Record, page 108). In fact, the operation of this business under the management of Appellee's employees was extremely profitable whereas, since April, 1953, the date Appellant took over, the profits have declined considerably (Record, pages 383-384). In addition, the evidence undisputably shows that Appellant did consent to the delegated performance by acceptance of the benefits thereof. Appellee, therefore, contends the rules of contract law as stated by the Restatement of the Law of Contracts, Sections 160(3) and 162(3) are applicable to this case.

In this regard, on page 10 of Appellant's response brief, it states in part as follows:

> "* * * The Lower Court found as a matter of fact that the employees of Pacific Enterprises, Inc., were not properly operating the business and that delegation to them was certainly not proper * * *"

The lower court did find as a matter of fact certain conditions which it held justified the Appellant in taking over control of the business (Record, pages 101-102). However, Appellee is unaware of any finding by the trial court to the effect that delegation was improper and the undisputed evidence is to the contrary.

In this connection Appellee wished to emphasize it does not argue or contend that Appellant had no right to participate in the management of the partnership business. Throughout its brief, Appellee believes the Appellant has confused this right to take over management with its asserted right to summarily and arbitrarily dissolve, terminate, liquidate and forfeit a partner's interest on the grounds of an alleged breach of agreement.

II.

APPELLEE AS PARTNER OF THIS VENTURE OR PARTNERSHIP HAS THE ACTUAL AND IMPLIED AUTHORITY TO DELEGATE MANAGEMENT DUTIES TO SUB-AGENTS.

In his opening brief, Appellee has argued that a partnership business which only comprises the mixing of ice cream and its sale and distribution is not such a financially complex venture that the manager there-

of should be precluded from the right to delegate such duties to sub-agents, particularly in the absence of an express limitation thereof. For his authority, Appellee cited several cases which stood for general principles of partnership law as affected by the law of agency (Plaintiff's opening brief, pages 11-19). Applicable code sections were also cited. Appellee believes that in such cases, the presence of such authority must be decided upon its own merits and that, therefore, specific cases in point are not necessarily valuable as authority.

The facts alone are important to this decision. When one considers the amount of delegation of duties that is a part of our economic structure, it would certainly seem safe to state that restrictions on delegations are the exception.

In this case, can it be said with any degree of seriousness that Appellee should not be able to fully delegate the responsibilities of opening and closing this ice cream store, checking the receipts, posting entries, taking inventory, mixing batches, dispensing cones and the many other menial tasks connected with its daily operation? Appellee was by ability and position far above the occupation of manager of an ice cream parlor and this factor was admittedly known by Appellant's president at all times during their negotiations.

The Appellee contends the facts show that Appellant bargained primarily for his capital and labor force. Under the general rule, an agent, not otherwise restricted, has the authority to delegate any clerical,

mechanical or ministerial acts (Guam Civil Code, Section 2349). Appellee contends he delegated only the mechanical acts relating to the daily operation of the store and no discretionary acts were in fact delegated.

Appellee is unaware of any special rule of partnership which alters the above rule. Although only one case (*Bank of North America v. Embury, N. Y.* (1861), 33 Barb. 323, 21 How. Pr. 14) has been found that holds that a resident partner that is obliged to be absent for a time may employ a general agent (Plaintiff's opening brief, page 17), the matter as presented here would seem to be resolved on the type of delegation that was actually made.

III.

A PARTNERSHIP OR JOINT VENTURE IS NOT TERMINATED OR LIQUIDATED BY THE SUMMARY AND ARBITRARY INTENT OF ONE PARTNER TO TENDER TO THE OTHER HIS ORIGINAL INVESTMENT, PARTICULARLY WHERE SUBSTANTIAL PROFITS REMAIN UNDISTRIBUTED.

An important issue is presented by argument of both parties heretofore. Briefly, it may be stated as follows: Can a partner who believes his co-partner has breached the partnership agreement, arbitrarily and summarily exclude such co-partner from all profits and all assets by serving a notice of termination not in accordance with the terms of the agreement, and, subsequently to such notice, liquidate the relationship under the terms and conditions of its own decision and choosing?

Appellant contends it can, and that, therefore, its action in using partnership funds to establish a competing business was not wrongful because this investment was made after Appellant excluded Appellee from the partnership in April, 1953. The pertinent portions of Appellant's arguments are as follows:

> "* * * The Court found that the defendant abandoned its efforts to get the plaintiff to return and took exclusive control of the partnership business on July 1, 1953 (R. 14805, p. 102). At this point liquidation has occurred. The evidence is undisputed that the defendant American Pacific Dairy Products, Inc. did not invest in Guam Frozen Products, Inc. until November, 1953, which was *five months after the liquidation* of the partnership business (R. 14805, p. 239). These findings establish that there was no partnership to be dissolved in November, 1953 when defendant invested in Guam Frozen Products. * * *" (Appellant's response brief, page 12)

However, even though it may be assumed that for the purpose of discussion only that Appellant was justified in assuming sole control of the assets on July 1, 1953 because of some act of Appellee that amounted to a breach of the partnership agreement, Appellee contends that liquidation in any case should proceed in orderly fashion. The remaining partner after dissolution occupies the position of a mere trustee, and his right to the possession of the partnership assets is merely for the purpose of winding up the partnership affairs (*Ruppe v. Utter* (1925) 76 Cal. App. 19, 243 P. 715). Certainly, a trustee should not

invest such funds for its own use and benefit, as did Appellant in this case.

It appears to Appellee that throughout the arguments of Appellant, it has misconstrued the nature of the liquidation of a partnership. It maintains liquidation occurs when, for any reason, one partner comes into sole and exclusive possession of partnership assets (Appellant's second brief, page 12). Appellant contends however, that liquidation is the process that occurs after dissolution and before termination; wherein pre-dissolution matters are disposed of, debt collected, accounting of relative interests made, and each partner's interest determined (Guam Civil Code, Section 2424; *Cotten v. Perishable Air Conditioners* (1941) 18 Cal. (2d) 575, 116 P. (2d) 603; *Freese v. Smith* (1952) 114 Cal. App. (2d) 283, 250 P. (2d) 261).

Therefore, assuming a legal dissolution occurred July 1, 1953, as found by the court (which Appellee disputes), there has been no liquidation of the partnership affairs as of this date.

As pointed out in Appellee's response brief, the offer of termination was improper and created no duty to answer before Appellee had an opportunity to return to Guam and be apprised of the local state of affairs. In addition, those cases cited by Appellant on page 46 of its opening brief relating to the duty of a partner to reply to an offer of termination would hardly apply to this situation. First, in those cases (*Wood v. Gunther* (1949) 89 Cal. App. (2d) 718, 201 P. (2d) 874; *Meherin v. Meherin* (1949) 93 Cal. App.

(2d) 459, 209 P. (2d) 36; *Pacific Atlantic Wine, Inc. v. Duccini* (1952) 111 Cal. App. (2d) 957, 245 P. (2d) 622), the court is concerned with bona fide cases of offers which, in the *Meherin* case contained audit reports and, in the *Wood* case, contained offers to submit the matter to evaluation. In this case, Appellant did not send an *offer to terminate,* but sent a *notice of termination;* an arbitrary action in contravention of the agreement between the parties. That Appellant sent a notice of termination and not an offer to terminate is admitted in its pleadings (Record, page 48). The Appellant claims that it tendered Appellee its original $15,000.00 investment. However, there is no evidence in the record that even infers that this tender was ever made (see Record, page 315).

In regards to the applicability of *Zeibak v. Nasser* (1938) 12 Cal. (2d) 1, 82 P. (2d) 375, to this case as stated by Appellant in its response brief on pages 13-14, Appellee is also willing to submit this case on the above authority.

Insofar as applicable here, Appellee contends that the *Zeibak* case, supra, held as follows:

(1) That the date of the decree of dissolution in an action wherein a partner is charged with wrongful conduct is the proper date of dissolution and the acts constituting such wrongful conduct do not *ipso facto* dissolve the partnership.

(2) A partner, in an accounting, is entitled to his *pro rata* share of the physical assets as of the date of dissolution. (In this case, Appellee was awarded only his original investment plus interest but Appellant's

president admitted that Appellee's interest was twice that amount, or approximately $30,000.00 (Record, pages 270-271).

(3) That the wrongful partner is not entitled to share in the good will.

Appellee contends that the *Zeibak* case does not hold that a partner who causes a dissolution by wrongful conduct may be excluded in the sense that his entire investment can henceforth be treated merely as a friendly loan.

Appellant contends it had a going business before Appellee became a partner. However, the record does not sustain this contention and the facts are otherwise. Appellee's employees and Appellee worked several days in the Dairy Queen before it commenced operations. While it is true that Appellant excluded Appellee, its only apparent justification was the fact of his absence from Guam, for it is admitted throughout the trial that Appellee earned substantial profits for the partnership. These profits were, in fact, considerably greater than what was earned under the present management by Appellant. Certainly, the *Zeibak* case is not authority for the justification of the exclusion of Appellee in this case as Appellant has contended.

IV.

WHERE ONE PARTNER BELIEVES ANOTHER HAS BREACHED THE PARTNERSHIP AGREEMENT, AND THAT SUCH BREACH PREJUDICIALLY AFFECTS THE WELFARE OF THE PARTNERSHIP BUSINESS, SUCH PARTNER SHOULD APPLY TO A COURT OF COMPETENT JURISDICTION FOR A DECREE DISSOLVING THE RELATIONSHIP.

Appellee believes that the law of partnerships requires, in those cases where the parties disagree on whether or not a given set of facts constitutes a breach of contract or a detriment to a going concern, that the question be resolved by a court of competent jurisdiction. Also, in those cases where the dissolution is accepted by all the parties, an accounting must be had if the parties cannot reach an agreement on their respective rights to the assets. As a practical matter, most cases Appellee has examined usually involve both questions of dissolution and accounting.

Sections 2425 and 2426 of the Guam Civil Code are interpreted by Appellee as requiring application to a court in all cases where it is alleged a breach of contract is wilfully and persistently committed, or it is alleged a partner is guilty of prejudicial conduct (Section 2426, (c) and (d)).

By virtue of the terms of the Articles of Co-Partnership of this venture, and by virtue of the lease of the real property involved, this partnership was one for a fixed term. To dissolve it before the expiration of its term is, as a matter of law, a violation of the agreement (*Bates v. McTammany* (1938) 10 Cal. (2d) 697, 76 P. (2d) 513). Hence, if Appellant's resolution constituted a dissolution of this venture, it was wrongful and its continual possession of the assets was

wrongful. On this basis, Appellee is entitled to his *pro rata* (50%) share of profits earned by the use of all the assets (*Mosley v. Mosley* (1952 C.A. 9th), 196 F. (2d) 663).

The Uniform Partnership Act is not clear on what the winding up of a partnership entails. It certainly is not, as Appellant contends, the exclusion of a partner from the business. Traditionally, it follows dissolution and is a marshalling of assets, determination of net worth, by appraisal if necessary, and the distribution in accordance with the agreement and/or the Uniform Partnership Act (see *Zeibak v. Nasser* (1938) 12 Cal. (2d) 1, 82 P. (2d) 375).

V.

AN ACCOUNTING FOR ALL PROFITS EARNED BY THE PARTNERSHIP BUSINESS IS JUSTIFIED UNDER THE CONDITIONS WHEREBY APPELLEE WAS EXCLUDED FROM THE AFFAIRS OF THE PARTNERSHIP.

The Appellee has contended that he is entitled to his *pro rata* (50%) share of all profits and that an accounting should be directed to that end. This accounting should be ordered on either of two grounds:

(1) the date of dissolution should be determined as of the date of judicial decree, or

(2) the Appellee is entitled to his *pro rata* share of profits because of the Appellant's wrongful use thereof after dissolution on July 1, 1953. In other words, the date of dissolution in this case is unimportant except that the assets are valued as of that date for

purposes of the accounting and the determination of the Appellee's interest therein.

Appellee's arguments are heretofore set forth in his opening brief and are not repeated here (opening brief, pages 23-30). However, Appellee believes several statements in Appellant's response (second) brief should be answered.

Appellee filed his action in September, 1954. He was excluded on or about July 1, 1953. Suffice it to say that the applicable statutes of limitation and general rules of laches answer any arguments to delay on the part of Appellee in formally objecting to his exclusion. Such delay does not constitute acquiescence. As stated hereinbefore, there was no tender to Appellee for his interest, either factually or legally, and the Appellant's statements to the contrary are completely erroneous and unsupported by the record.

As regards the diversion and use of funds belonging to Appellee, the fact thereof was admitted by Mr. Edward Thompson, Appellant's president (Record, Case No. 14805, page 245).

VI.

THE APPOINTMENT OF A RECEIVER IS WITHIN THE DISCRETION OF THE TRIAL COURT, AND THERE IS SUFFICIENT EVIDENCE IN THE RECORD OF APPELLANT'S BAD FAITH TO JUSTIFY A REVIEW BY THIS COURT WHETHER OR NOT THERE WAS AN ABUSE OF SUCH DISCRETION.

Appellee does not contest the rule of law applicable to the appointment of a receiver in matters of this nature. However, the fact that Appellee's funds were

diverted and used by Appellant in another business wherein stock thereto was issued solely in the name of Appellant, where, immediately after Appellee's exclusion, profits dropped drastically, indicating diversion, mismanagement, or both, and where, since April, 1953, the Appellant has attempted to deny to Appellee any of the profits earned by the business during his vicarious management, all tend to show such a state of affairs that is it likely that Appellee will be irreparably harmed if the business is allowed to be continued in Appellant's hand?

VII.

AS A MATTER OF LAW, THE WRONGFUL PARTY TO A DISSOLUTION IS NOT ENTITLED TO THE GOOD WILL.

Appellee and Appellant concur in their analysis of the applicable law in this issue. The only disagreement is its application to this case.

Appellee contends that the lower court erred in holding that Appellee breached the agreement by leaving Guam. (The court also held that no damages resulted from Appellee's absence, Record, page 103). It is important to note, however, that the court also found that Appellant excluded Appellee from all of the affairs of the partnership (and, upon no evidence thereto, held erroneously that he acquiesced to such exclusion), that it used the profits and capital investment of Appellee for its own use and enjoyment, and that it diverted such funds into a competing business (Record, Case No. 14805, pages 108-113).

It would seem without a doubt that Appellee is entitled to the good will as innocent, or more innocent, party to the dissolution. Assuming the decision of the lower court relating to the finding that Appellee caused the breach is upheld, Appellee contends that this Court is still confronted with wrongful acts of Appellant which should effect his right to the good will.

CONCLUSION.

Appellee, and Cross-Appellant, Mr. Joseph A. Siciliano, is entitled to more than the return of his original investment with interest plus profits earned to July 1, 1953 because the Appellant and Cross-Appellee, American Pacific Dairy Products, Inc., withheld profits, wrongfully excluded Appellee, and used his capital and profits to further its own interests to Appellee's detriment. Appellee believes he is entitled to at least a one-half interest in all assets, including the good will, or its value, as of July 1, 1953, one-half of all profits earned to February 18, 1955, and an accounting so that the rights of the parties may be finally determined.

Dated, Benicia, California,
March 9, 1956.

Respectfully submitted,
John A. Bohn,
Walter S. Ferenz,
Attorneys for Cross-Appellant and Appellee.